



BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER  
CHAIRMAN

WILLIAM A. MUNDELL  
COMMISSIONER

JEFF HATCH-MILLER  
COMMISSIONER

MIKE GLEASON  
COMMISSIONER

KRISTIN K. MAYES  
COMMISSIONER

Arizona Corporation Commission

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UTILITIES DIVISION STAFF,

Complainant,

v.

ESCHELON TELECOM OF ARIZONA, INC.)

Respondent

Docket No. T-03406A-03-0888

**MOTION TO DISMISS AND  
ANSWER OF ESCHELON  
TELECOM OF ARIZONA, INC.**

Eschelon Telecom of Arizona, Inc. ("Eschelon") files this Motion to Dismiss and Answer in response to the Complaint ("Complaint") filed by the Arizona Corporation Commission ("Commission") Utilities Division Staff ("Staff").

**INTRODUCTION**

Staff's Complaint alleges that Eschelon violated 47 U.S.C. § 252(e) of the Telecommunications Act of 1996 (the "Act") and A.A.C. R14-2-1506(A) and (C) by failing to file certain documents with the Commission that it alleges are interconnection

agreements between Eschelon and Qwest Corporation (“Qwest”). Eschelon denies that it violated the Act or Commission Rules by failing to file those documents for Commission approval.

While Eschelon regrets its participation in any interconnection agreements that were not filed with the Commission and apologizes for its role regarding those agreements, it was under no legal obligation to file those agreements for approval under Section 252(e) of the Act. Given its understanding of the law at the time, its reliance upon Qwest, and its history of dealings with Qwest, Eschelon held a good faith belief that it had no independent duty to file interconnection agreements and that the decision to file was to be made by Qwest. Qwest insisted that the documents be kept confidential and informed Eschelon that they need not be filed. Therefore, Eschelon denies that its actions constituted a violation of the Act or state law by Eschelon. Rather, the obligation to determine which agreements constituted interconnection agreements and to file such agreements rested solely with Qwest.

**MOTION TO DISMISS**

Pursuant to Arizona Administrative Code R14-3-101 *et seq.* and Arizona Rules of Civil Procedure 12(b)(1) and (6), Eschelon moves to dismiss all or portions of the above-captioned Complaint, because: (1) Eschelon had no legal obligation to file interconnection agreements with the Commission and (2) at least four of the ten documents identified in the Complaint were not interconnection agreements and therefore were not subject to the filing requirements under Section 252(e) of the Act.

The Complaint alleges that Eschelon violated the Telecommunications Act and Commission Rules by failing to file interconnection agreements with the Commission for approval. However, a review of Section 252(e) of the Act and A.A.C. R14-2-1506 reveals no explicit requirement that CLECs, like Eschelon, file such agreements for

1 approval with state commissions. In fact, both the purpose of the Act and the FCC's  
2 Orders interpreting the Act indicate that the legal obligation to file interconnection  
3 agreements rests with the ILEC (*i.e.* Qwest) and not with the CLEC. Since Eschelon had  
4 no legal duty to file the agreements, its failure to file them did not violate the law. For this  
5 reason, this matter should be dismissed.

6 In addition, as further explained in Eschelon's Answer, items 6, 7, 8, and 9,  
7 as listed in Table 1, Paragraph 8 of the Complaint, are not interconnection agreements.  
8 Therefore, even assuming that Eschelon had a legal obligation to file interconnection  
9 agreements, failure to file those particular documents was not a violation of that  
10 obligation.

11 These defenses, as well as the others stated as affirmative defenses in the  
12 Answer below, dictate that this matter be dismissed.

13 **ANSWER**

14  
15 1. Eschelon admits the allegations made in Paragraph 1 of the Complaint,  
16 but denies that the statutes and constitutional provision cited give the Commission  
17 jurisdiction over the issues raised in this Complaint.

18 2. Eschelon admits the allegations in Paragraph 2 of the Complaint.

19 3. The allegations in Paragraph 3 of the Complaint consist of factual  
20 allegations in addition to statements about Commission Rules and federal law. Eschelon  
21 affirmatively alleges that the statutes and rules referenced speak for themselves. Eschelon  
22 admits that it entered into certain agreements with Qwest, that those agreements contained  
23 provisions stating that the agreements were confidential, and that the agreements were not  
24 filed for approval at that time. Eschelon denies the remaining allegations of Paragraph 3.

25 4. In response to Paragraph 4 of the Complaint, Eschelon restates its  
26 responses to paragraphs 1 through 3 of the Complaint.

1           5. Paragraphs 5, 6 and 7 of the Complaint consist of statements about  
2 federal law or Commission rules. Eschelon affirmatively alleges that the statutes and rules  
3 referenced speak for themselves.

4           6. Eschelon admits that it is a party to the documents listed in Paragraph 8,  
5 Table 1, of the Complaint and that items 1 through 5 and item 10, as listed in Table 1 of  
6 the Complaint, were negotiated and executed by Qwest and Eschelon. In accordance with  
7 Eschelon's current understanding of an interconnection agreement as defined in the FCC's  
8 Declaratory Ruling,<sup>1</sup> Eschelon states that items 1 through 5 and item 10 are  
9 interconnection agreements, although they also contain portions that are not  
10 interconnection agreements or are not applicable to Arizona.

11           Eschelon denies that items 6 through 9 on Table 1 of the Complaint are  
12 interconnection agreements. Eschelon admits that items 6, 8 and 9 memorialize  
13 agreements that were negotiated by Qwest and Eschelon, but denies that Eschelon  
14 executed items 6 and 9 on Table 1. Eschelon denies that item 7 on Table 1 of the  
15 Complaint is an agreement or that it reflects or memorializes an agreement between  
16 Eschelon and Qwest and therefore denies that it is an interconnection agreement. That  
17 document was a unilateral statement by Qwest that was not agreed to by Eschelon.

18           7. In response to Paragraphs 9 and 10 of the Complaint, Eschelon admits  
19 that it did not file the documents listed in Paragraph 8 of the Complaint with the  
20 Commission for approval at the time of their execution. Eschelon denies that it was  
21 required to do so pursuant to 47 U.S.C. § 252(e), and Eschelon further denies that it  
22 violated that statute.

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<sup>1</sup> *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, FCC 02-276, 17 FCC Rcd 19337(Released October 4, 2002) (Declaratory Ruling).

9. In response to Paragraph 13 of the Complaint, Eschelon admits that an agreement entered into with Qwest contained, among other things, a provision under which Qwest agreed to pay Eschelon an amount that was ten percent of the aggregate billed charges for all purchases made by Eschelon from Qwest for a period of five years, if the conditions of that agreement were met, but denies that it actually received a 10 percent discount for the full five year period. Eschelon affirmatively alleges that the agreement speaks for itself.

Eschelon asserts the following affirmative defenses:

- 1518253.1

1           7.     At all times relevant to this matter, Eschelon operated under the good faith  
2 belief that it was not required to file the agreements in question.

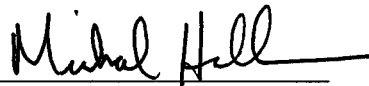
3           8.     Imposition of penalties based upon a failure to file interconnection  
4 agreements at a time when no clear filing standard existed and at a time when no  
5 determination had been made as to the filing obligations of CLECs would violate the fair  
6 notice doctrine and Eschelon's due process rights.

7           9.     Eschelon's actions concerning the matters at issue were taken under duress.

8                   WHEREFORE, Eschelon urges the Commission to find that Eschelon did  
9 not violate the statutes set forth in the Complaint, that Eschelon was under no legal duty to  
10 file the agreements in question with the Commission, that some of the documents in  
11 question are not interconnection agreements and that this matter should be dismissed for  
12 the reasons stated above.

13           Respectfully submitted this 20<sup>th</sup> day of May, 2004.

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Original and thirteen (13) copies  
of the foregoing filed this 20th day  
of May, 2004, with:

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COPY of the foregoing hand-delivered  
this 20th day of May, 2004, to:

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COPY of the foregoing mailed this  
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